No. 92-1287

In The

Supreme Court of the United States

October Term, 1992

ROBERT TAYLOR and TIMOTHY COTTON,

Petitioners,

vs.

FLORIDA ATLANTIC UNIVERSITY, HELEN POPOVICH, KENNETH MICHELS, DENNIS NICEWANDER, DON GARDNER, MARILYN FLOYD, LEONARD BERRY, and ANTHONY CATANESE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE OF RESPONDENTS, KENNETH MICHELS, DENNIS NICEWANDER, MARILYN FLOYD AND LEONARD BERRY, TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Whether, in a claim for deprivation of First Amendment rights by retaliatory discharge, where the Plaintiffs have only alleged intentional deprivation, it was proper for the District Judge to charge the jury that 42 U.S.C. § 1983 provides a remedy to parties suffering such intentional deprivation of rights as that claimed by the Plaintiffs.

B. Whether the District Judge properly exercised his discretion in excluding testimony of a purported expert witness in an area of novel expertise where the Plaintiffs, who proffered the testimony, failed to establish its conformity to a generally accepted explanatory theory.

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The Respondents, Kenneth Michels, Dennis Nicewander, Marilyn Floyd and Leonard Berry, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's decision in this case.

I. COUNTERSTATEMENT OF THE FACTS

The case presents a situation where the annual employment contracts of two staff members of a state university were not renewed in 1988 upon recommendation of their supervisor. The reason for the nonrenewal was that the two had become discordant elements in the functioning of their department. The two thereafter initiated litigation against various present and former university administrators in which they claimed that their nonrenewal was a retaliatory act and the result of a conspiracy among the Defendants whose alleged purpose was to punish them for the actions of one of them two years earlier in publicly raising questions about the propriety of certain school purchases. Their claim was considered and rejected in a jury trial.

Florida Atlantic University (FAU) was a state school established in Boca Raton, Florida, in 1963 and which steadily expanded more than tenfold over the next 25 years. As a result of this growth, the administrative organization was frequently restructured to reflect expanding needs (R: 29-2762). At the time in issue (1985-1988), the university hierarchy was organized with three vice-presidents serving under the university president: the Academic Vice-President and Provost, the Administrative Vice-President, and the Vice-President for University Relations and Development. Each had charge of a separate sphere of university administration.

The Plaintiffs, Robert Taylor and Timothy Cotton, had been employed by FAU in the early 1970's to work in the school's computer operations (R: 18-634; R: 20-1048). Over the years, these operations expanded and, in 1983,

they were divided according to function: the academic computing department was created and reported through its director ultimately to the Academic Vice-President and Provost; the administrative computing department reported ultimately to the Administrative Vice-President (R: 24-1920-3; R: 17-367-8). Shortly after this functional division, Taylor and Cotton transferred to the academic computing department where their ultimate supervisor below the President was the Academic Vice-President and Provost (R: 29-2924; R: 20-1048; R: 24-1922). Despite earlier disciplinary problems, Taylor rose to the position of associate director of academic computing under William King, the departmental director. At the time, Kenneth Michels was Academic Vice-President (R: 29-2924; R: 19-642; R: 24-1924).

In late 1985, a school purchasing clerk received a requisition for a GMS microcomputer and printer from the Dean of Business School, as a sole source purchase[1] (R: 20-997). She questioned whether the printer could not be replaced with a listed model and consulted Taylor (R: 19-659; R: 20-997-8). Taylor's function in respect to computer purchases was solely to determine the technical compatability between a new item and the school's existing equipment; he had been given no charge to determine the propriety of purchase requests (R: 19-665). The propriety of such requests was the responsibility of the

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[1] Goods are usually purchased on competitive bidding or under standing, pre-negotiated contracts. When an item is only obtainable from a sole source, its purchase may be authorized even though it is neither bid nor listed as a pre-negotiated item (R: 28-2663-5).

administrative sphere and, ultimately the Administrative Vice-President who, at the time, was Dennis Nicewander (R: 28-2663-5).

Taylor, nonetheless, entertained doubts as to the propriety of the request as a sole source purchase; he discussed the matter with his superior, King, and the two of them raised the issue in February, 1986, at a meeting of the University computer advisory committee. This committee operated functionally within the academic sphere and the assistant academic vice-president who chaired the meeting advised King and Taylor that the matter was not within the committee's area of responsibility, but appropriately resided with administrative affairs (R: 19-660; R: 24-1944). Taylor, contrary to Petitioners' suggestion, did not "disapprove" the purchase; rather, he signed his approval certifying the machine's compatability (R: 19-665). Eventually Nicewander, who had never been told that anyone questioned the propriety of the purchase and who reviewed a number of purchase requests each day, perfunctorily approved the purchase (R: 28-2663-4).

When a second requisition for the same model computers was made by the Business School Dean (but this time, the requisition was for a competitive bid), Taylor and a faculty member from the Business School, John Munson – whose application for promotion had just been rejected by the Dean – decided to question anew the acquisition since several Business School faculty members reportedly worked for the computer manufacturer (R: 15-119; R: 22-1478). Rather than raising the issue with the Administrative Vice-President, they decided that Munson would present the matter to the State Attorney (R: 19-674, 682). This was done in September, 1986 (R:

15-144-152). Although Academic Vice-President Michels had had no involvement in the computer purchase request or its approval, Taylor and Munson suggested in a written submission to the State Attorney that he was involved (R: 17-198). At trial, Munson candidly admitted that his goal was one of vengence – seeking the removal of Dean Luing and Michels for denying his promotion (R: 17-189, 202).

After a thorough and confidential investigation, the State Attorney found no violation of state law or other impropriety within his sphere of concern and forwarded his information to the Chancellor of the State University System for determination of whether any department regulations had been violated (R: 17-340). The Chancellor assigned the task of further investigation to a system auditor, Harvey Sweeney; Sweeney found no evidence of violations by the school administrators of ethical or administrative rules, but he issued a report in late September, 1986, which was critical of upper-level management's supervision of mid-level management (R: 17-282, 306). The Chancellor directed the University President, Helen Popovich, to prepare a plan to correct supervisory deficiencies (R: 22-1455). Subsequent to the receipt of Sweeney's report, Popovich called a meeting of all those involved as proponents or targets of the charges in an effort to resolve any remaining issues[2] (R: 22-1442). The meeting was not successful.

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[2] Although Taylor was in attendance, Cotton was not. There was no evidence of significant involvement by Cotton in the events of 1986; none of the school administrators had knowledge of such involvement (R: 22-1480, 24-1782, 24-1951, 28-2686).

In early November, 1986, articles began appearing in the local news media which distorted and sensationalized the findings of Sweeney and the State Attorney. As a result of continual press coverage of the matter, several employees in the purchasing department complained to the administration that direct contacts by reporters were involving substantial amounts of their time; as a consequence, the Administrative Vice-President, Nicewander, issued a memorandum addressed only to the senior staff in administrative affairs which advised that all press contacts should be through upper management (R: 22-1452; R: 28-2686, 2688)[3]. This memorandum was withdrawn the day it was issued after the Vice-President for University Relations, Adelaide Snyder, registered her objection with the President (R: 22-1453).

As a result of continued press coverage, much of it increasingly critical of Nicewander and Michels, the ability of both to effectively function was impaired and, in early December, 1986, Popovich asked for, and received, their resignations (R: 23-1548). They both took lengthy sabbaticals before returning the following year to teaching positions; after early December, 1986, neither was involved in school administration or attended cabinet meetings (R: 23-1608; R: 27-2427; R: 28-2652, 2698; R: 22-1467)[4].

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[3] This memorandum on its face only affected the staff in administrative affairs; it could have no effect upon Taylor or Cotton who were within the sphere of academic affairs and were not answerable to Nicewander.

[4] Snyder testified at trial that there had been discussions at cabinet meetings attended by Michels and Nicewander about retaliating against Taylor and Cotton. It was shown, however,

After the resignations of Michels and Nicewander, the controversy of 1986 died out; by 1988, it was relatively ancient history (R: 15-174).

In 1987, King developed a plan to reorganize the expanded department of academic computing which had doubled in size and was about to open a branch in Broward County (R: 24-1952; 29-2762). Where previously all staff had reported to King through Taylor, King's reorganization provided for two assistant directors who, together with Taylor (who remained the associate director), split the supervision of the staff and departmental functions; Taylor continued to serve as acting director in King's absence (R: 24-1953-5). One of the two new assistant director's position was filled by Cotton, who was promoted accordingly (R: 24-1953-5).

Almost immediately, Taylor chaffed under the new structure and generally ignored the restructured chain of command; while he and King remained personal friends[5], friction between them began to surface (R: 24-1956-7).

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that Cotton had not been actively involved in the matter prior to December, 1986 and, in any event, his involvement, if any, was not known to the school administrators prior to Michels and Nicewander's leaving the cabinet. Testimony from the various members of the cabinet at that time, besides the school administrators who were defendants, established that there was no such discussion (R: 23-1617; R: 24-1776; R: 26-2272; R: 27-2300). It was demonstrated that Snyder, who had been demoted and then resigned under Popovich's successor, harboured embittered feelings toward the school administration. Her charges had not been made prior to her demotion.

[5] King had been an ally in the so-called "whistleblowing" events of 1986.

King attempted to communicate verbally and, when that proved of no avail, he sent Taylor personal counselling notes which were not placed in Taylor's personnel file (R: 24-1962-9). Taylor responded, acknowledging that personal problems were affecting his job performance and attitude (R: 24-1978-80). When a dramatic and tempestuous confrontation between Taylor and a fellow staff member – who was then his girlfriend and roommate – exploded before students and staff, King decided that some further steps needed to be taken (R: 24-1998-2003). At that time, a temporary vacancy among the managerial staff of academic computing in Broward County provided King the opportunity to transfer Taylor to the satellite campus until matters cooled down (R: 24-2007)[6]. Although the transfer did not affect Taylor's position or functions (which were not site specific), Taylor refused the move, giving as a reason the inconvenience of a 20-minute commute (R: 29-2777-8). King, who began to view this as a challenge to his authority, became insistent; Cotton weighed in on the side of Taylor, and memoranda arguing the move and motivation of the parties began to circulate on the computer mailboard (Def. Ex. 70; R: 26-2041, 2044, 2066). Taylor appealed the transfer to Marilyn Floyd, the Assistant Vice-President for Academic Affairs and King's superior, and then to Leonard Berry, the new Vice-President for Academic Affairs (R: 29-2860). The appeal was initially denied but, upon the intervention of President Popovich, a resolution was achieved

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[6] Cotton, who had supervision of academic computing on the Broward campuses under King, asked the latter to make a temporary assignment (R: 24-2007).

whereby a staff member from another department filled the vacancy (R: 29-2779).

Taylor and Cotton were not satisfied that King had finally backed down from his position under administrative pressure, but began to circulate additional memoranda within the department criticizing King and the new appointee (R: 26-2066, 2044; R: 26-2054-5). The situation became a virtual "civil war" within the department (R: 21-1189). When Berry called a departmental meeting in an effort to quench the flames of discord, Taylor and Cotton took the opportunity to heap personal invective upon King (R: 29-2865-6; R: 20-861). Significantly, at trial, both Cotton and Taylor confessed shame over the character and tenor of their conduct (R: 21-1221, 1236; R: 20-861).

During this time frame, the University, in response to a study, was in the process of combining academic and administrative computing under the supervision of the newly-created position of Associate Vice-President for Information Resource Management who would report directly to the President (R: 29-2787; R: 18-540). The new position was filled, after an extensive national search, by Don Gardner (R: 20-864). King, meanwhile, resigned to take a position with the state legislature (R: 29-2836). When Gardner came on board on July 11, 1988, he was advised by the personnel director that his first order of business would be to review the annual contracts of all administrative and professional staffers in his department which were up for renewal (R: 27-2511-2). He set about to interview all of the A & P personnel in his department, including Taylor and Cotton. While he had learned a few details of the spring imbroglio involving

Taylor, Cotton and King, he determined to make up his own mind as to the suitability of Taylor and Cotton to function within the new reorganization of computer operations at the school (R: 27-2540-2). His interview with Taylor and Cotton did nothing to convince him that they could work with the needed harmony in the new structure; on the contrary, they demonstrated by their arrogance and attitude that they would be as troublesome a pair of subordinates to Gardner as they had been to King (R: 27-2529-2530, 37; R: 27-2546-7, 2552-4). Gardner, on his own and with no outside influence, decided not to renew their contracts; he also decided at the same time not to renew the contracts of certain A & P staffers in administrative computing (R: 27-2556, 2561). His decision was finally approved by President Popovich after some delay.

II. REASONS FOR DENYING THE PETITION

Review by certiorari is not a matter of right, but of judicial discretion. It should be granted only where there are special and important reasons for doing so. Sup. Ct. R. 17.1. The Petition presents no basis for such review. On the contrary, the decision below was correct and should not be disturbed.

A.

1) THE PLAINTIFFS ONLY ALLEGED AND OFFERED EVIDENCE TO PROVE INTENTIONAL DEPRIVATION OF CONSTITUTIONAL RIGHTS AND RAISED NO ISSUE IN THE PLEADINGS OR PROOF OF NON-INTENTIONAL DEPRIVATION.

The District Judge's jury charge on the elements necessary to establish the claims alleged by the Plaintiffs

under 42 U.S.C. § 1983 was particularized to the nature of the asserted claims and properly set forth the law as it applied to those claims.

The case proceeded to trial upon the claims set forth in the first two counts of the Second Amended Complaint (R: 1-32; Appendix 7a-19a; the references hereinafter to specific paragraphs are found at these pages in the Appendix). In the general allegations, the Plaintiffs alleged that the Defendants had engaged in a "continuing pattern or practice of discrimination and retaliation" (paragraph 34) and that the Defendants, Popovich, Michels, Nicewander, Floyd and Berry "unlawfully agreed and conspired . . . to intentionally hinder, obstruct and injure the Plaintiffs' career advancements . . . " (paragraph 35). In Count I, which asserted the claim for deprivation of rights under the First Amendment, the Plaintiffs alleged that all of the Defendants, alone and in concert, "unlawfully did punish Plaintiffs' lawful exercise of their rights to free association, speech and press . . . " (paragraph 38); that the Defendants' "unlawful actions were designed to humiliate and embarrass Plaintiffs . . . " (paragraph 40); that the action of Defendant, Popovich, "was specifically designed and calculated to teach Taylor, Cotton and other 'whistleblowers' . . . a lesson about the consequences of speaking out . . . " (paragraph 41); that the Defendants' actions were "wanton, reckless, willful, malicious *and* constituted a deliberate abuse of their official powers . . . " (paragraph 42; emphasis added).

In Count II, which attempted to state a claim for deprivation of a property interest without due process[7],

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[7] The nature of the Plaintiffs' employment was such that they had no property interest in the reappointment to their

the Plaintiffs reasserted the general allegations and alleged that the refusal to reappoint Taylor and Cotton to their positions was based on the exercise of their First Amendment rights.

It is plain from a review of this pleading that the allegations consistently aver purposeful, intentional conduct by all of the Defendants aimed at retaliating against Taylor and Cotton for having been "whistleblowers". All of the allegations which describe the supposed conduct of the Defendants clearly portray actions which could only be intentional[8].

Beyond the allegations, the Plaintiffs' evidence suggested only deliberate and intentional conduct constituting an alleged conspiracy, the purpose for which was to punish the Plaintiffs[9].

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non-tenured positions. They attempted to construct a property interest predicated upon a state regulation – Rule 6 c 5 – 5.010(3)(b), *Florida Administrative Code*, which provided that a failure to reappoint an employee "shall not be based on constitutionally impermissible grounds". The Plaintiffs theorized that such a rule created something more than a unilateral expectation in continued employment.

[8] This is true even of the one paragraph (paragraph 42) which characterizes the degree of egregiousness of the alleged conduct. While one of the terms – "reckless" – might, if used alone, suggest less than intentional conduct, it is instead conjoined with the phrase "constituted a deliberate abuse" and within this context can only imply purposeful and intentional action.

[9] Of course, the Plaintiffs' evidence was subject to question and their contentions were rejected in their entirety by the jury.

Recognizing the nature of these claims, the District Judge prefaced his jury instructions accordingly:

> In this case, plaintiffs Taylor and Cotton each claim that defendants Gardner and Popovich, while acting under color of state law, intentionally deprived him of his constitutional rights under the Constitution of the United States.
>
> (R: 30-3138; Appendix 1a).

He then continued with the language objected to by the Plaintiffs:

> The law provides that a person may sue in this Court for an award of money damages against anyone who, under the color of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.
>
> (R: 30-3139; Appendix 1a-2a).

Considered together with the description given earlier of the nature of the Plaintiffs' claims, it is clear that the latter comment by the District Judge did no more than inform the jury that, if the Plaintiffs' claim were proven as made, then Federal law provided a remedy. The Court then proceeded to lay out the elements necessary to establish a claim under 42 U.S.C. § 1983:

> In order to prove their claim against an individual defendant, therefore, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that the acts of the defendant were under color of authority of the State of Florida; second, that the plaintiff's exercise of his protected First Amendment rights

> was a substantial or motivating factor in the defendant's participation in a decision to issue nonrenewal contracts to the plaintiff; and third, that the defendant's acts were the proximate or legal cause of damages sustained by the plaintiffs.
>
> (R: 30-3139; Appendix 2a).

In setting forth the essential elements needed to prove a claim, the Court did not suggest that a claim could only be established if the conduct of the Defendants was intentional. Nor can this instruction, drawn as it is from this Court's decision in *Mt. Healthy City School Dist. Board of Education v. Doyle,* 429 U.S. 274, 50 L.Ed. 2d 471, 97 S.Ct. 568 (1977), be seriously objected to by the Petitioners. By focusing on a single sentence in the jury charge and presenting it divorced from the context in which it was made, the Petitioners have simply distorted the nature and the import of the overall jury charge in this case. Considered in its entirety, it is obvious that the instructions given in this case do not present the issue suggested for review by the Petitioners.

2) THE CIRCUITS ARE NOT CURRENTLY IN SUBSTANTIAL CONFLICT OVER THE STATE OF MIND REQUIREMENT FOR CLAIMS OF RETALIATORY FIRST AMENDMENT DEPRIVATION UNDER 42 U.S.C. § 1983 AND THIS COURT'S EXISTING PRECEDENT PROVIDES ADEQUATE AUTHORITY TO GUIDE RESOLUTION OF THE ISSUE.

The Petitioners' contention that the various Circuits are in conflict over the state of mind requirement for

claims brought under 42 U.S.C. § 1983 for violation of First Amendment rights is unconvincing. They rely principally upon two Circuit opinions and one District Court opinion as establishing authority for the proposition that a negligence-based claim is sufficient. *Foley v. Alabama State Bar*, 648 F.2d 355 (5th Cir. 1981); *Lowe v. Letsinger*, 772 F.2d 308 (7th Cir. 1985), and *Boussom v. City of Elkhart*, 567 F.Supp. 1382 (N.D. Ind. 1983). All three of these decisions derive from the now receded-from dicta in *Parratt v. Taylor*, 451 U.S. 527, 686 L.Ed. 2d 420, 101 S.Ct. 1908 (1981) and precede the opinions of this Court in *Daniels v. Williams*, 474 U.S. 327, 88 L.Ed. 2d 662, 106 S.Ct. 662 (1986); *Brower v. County of Inyo*, 489 U.S. 593, 103 L.Ed. 2d 628, 109 S.Ct. 1378 (1989), and *Wilson v. Seiter*, ___ U.S. ___, 115 L.Ed. 2d 271, 111 S.Ct. 2321 (1991). It cannot be seriously contended that they represent the current status of the law in those Circuits and District. Furthermore, a careful reading of *Foley* demonstrates that the Court assumed, but did not decide, that a claim predicated upon negligent denial of First Amendment liberties is actionable. There is no indication in the opinion that the negligence-founded basis of the claim was ever challenged by the defendant. In *Lowe*, a case involving a criminal defendant's claim of conspiracy between a judge, a court clerk and the state attorney general to conceal notice to him of a ruling upon a motion for postconviction relief, the only discussion of a negligence-founded claim is contained in that portion of the opinion considering the claim against the attorney general. After rejecting the conspiracy count against the attorney general for failure of the complaint to allege that defendant's knowledge (noted by the Court as an essential element of such a claim), the Court also

rejected an individual action claim – predicated on an alleged misrepresentation to the Federal Court of the status of the postconviction proceeding in state court – for failure of the complaint to allege that the attorney general had a duty to inquire as to the status of the proceeding. In the course of its discussion, the Court noted that state officials had been held liable in actions brought under 42 U.S.C. § 1983 for negligent conduct. In support, it cited *Parratt* and two Courts of Appeals' decisions – *Crawford v. Edmonson*, 764 F.2d 479 (7th Cir. 1983) and *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976). Neither case implicated a First Amendment right: *Crawford* involved Fourth and Eighth Amendment rights (and held that while 42 U.S.C. § 1983 contained no state of mind requirement, the particular right alleged to be violated might), and *Bonner* involved Fourth Amendment rights. Indeed, it is not clear in *Lowe*, itself, as to the nature of the Constitutional right allegedly violated by the attorney general's action. It appears most likely to have been a due process right under the Fourteenth Amendment.

The Petitioners also cite *Caballero v. City of Concord*, 956 F.2d 204 (9th Cir. 1992) as holding that claims under 42 U.S.C. § 1983 do not require proof of intent. *Caballero* involved a claim of violation of Fourth Amendment rights rather than First Amendment rights. Although the decision in *Caballero* may be difficult to reconcile with this Court's holding in *Brower*, supra, the present cause is obviously not the vehicle to remedy the Ninth Circuit's misunderstanding of the necessary elements in a Fourth Amendment claim.

Finally, the Petitioners point to two unpublished opinions – *Livesay v. Dawson*, No. 90-6647, 923 F.2d 848

(table) (4th Cir., Jan. 25, 1991), and *Walker v. Tennessee Dept. of Corrections*, No. 90-5075, 924 F.2d 1060 (table) (6th Cir., Jan. 31, 1991) – as holding that claims under 42 U.S.C. § 1983 for violation of First Amendment rights may be predicated on negligence[10]. *Walker* makes no such holding. The Court of Appeals affirmed, upon different grounds, a magistrate's dismissal of a complaint based upon an allegation of negligent denial of First Amendment rights. The Appellate Court simply noted that the authority relied upon by the magistrate, *Daniels*, supra, implicated Fourteenth rather than First Amendment rights and, therefore, was not apposite precedent. Only *Livesay*, of all the Circuit precedents cited by the Petitioners, holds that a negligent violation of First Amendment rights is actionable. In doing so, it cites to pre-*Daniels* authority.

Significantly, in view of the analytical methodology utilized by this Court in *Wilson v. Seiter*, supra, for determining the state of mind requirement sufficient to produce a constitutional deprivation (and, hence, an actionable claim under 42 U.S.C. § 1983), none of the cases cited to by the Petitioners as holding that negligence suffices to constitute a deprivation of First Amendment rights involves a claim brought for retaliatory conduct[11].

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[10] It is perhaps noteworthy that rules in both the Fourth Circuit (4th Cir. I.O.P. 36.6) and the Sixth Circuit (6th Cir. Local Rule 24), discourage the citation of unpublished opinions as precedential authority.

[11] In *Wilson*, this Court noted that the Eighth Amendment proscription against cruel and unusual *punishment*, by the very implication of the term *punishment*, could not be violated by

When the charge given to the jury in this case is considered in its context and in light of the allegations and evidence, it is clear that this case does not present the issue for review urged by the Petitioners. A careful examination of the authorities cited by the Petitioners fails to establish a serious present conflict between the Circuits upon the issues presented in cases involving the precise nature of the claim involved in the present case. These Respondents respectfully suggest that no basis for certiorari review is presented by Petitioners' first issue.

B.

THE DISTRICT JUDGE'S RULING ON THE PLAINTIFFS' PROFFER OF TESTIMONY BY AN ALLEGED "WHISTLEBLOWER" EXPERT WAS A PROPER EXERCISE OF DISCRETION.

During the course of the trial, the Plaintiffs sought to use the testimony of Thomas Devine, an attorney frequently representing plaintiffs in "whistleblower" suits, who was purported to be an expert in the field of "whistleblowing". The Plaintiffs announced that Devine's testimony would be to the following effect: the time lag

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negligent or other non-deliberate conduct. Similarly, in the case of *retaliatory* firing of an employee for the exercise of free speech rights protected under the First Amendment, the fact that the very nature of the violation supposes deliberate conduct in the form of retaliation – the return of like for like; repayment in kind; requital; reprisal – argues strongly that an element of intent or purposefulness is essential to the establishment of a claim for such violation. Thus, claims for First Amendment deprivations not predicated on retaliatory actions are of little value in assessing the essential elements for a claim of this type.

between Taylor's claimed "whistleblowing" in 1986 and his termination in 1988 was consistent with patterns of retaliation; retaliation against "whistleblowers" is often made by others than the person who was the target of the "whistleblowing"; King's actions were supportive of a scheme to retaliate against Taylor, and a common institutional tactic taken by administrators is to pursue such action as will cause a "whistleblower" to become frustrated in his job and then act in such ways as would justify the planned retaliatory measures (R: 22-1360-1365).

The Plaintiffs made no effort to lay a predicate for the introduction of expert opinion evidence in this admittedly novel area of expertise. No showing was made or attempted that would have established the reliability or scientific acceptability of observations of behavioral patterns and phenomena relating to "whistleblowing" and institutional responses to "whistleblowing". The District Judge properly rejected the proffer, noting that the proposed subject of the opinion testimony was "not so scientific as to require expert testimony".

In the case of *Sterling v. Velsical Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988), the Sixth Circuit set forth a four-part test for the admissibility of expert opinion testimony under Rule 702:

> In accordance with Rule 702, a four-part test must be met to uphold the admission of "expert testimony": 1) a qualified expert 2) testifying on a proper subject 3) *which is in conformity to a generally accepted explanatory theory* 4) the probative value of which outweighs its prejudicial effect.

. . .

> With respect to the third criterion, the principles upon which the scientific evidence is based must be sufficiently established to have gained wide acceptance in the field to which it belongs.
>
> (id. at 1208) (emphasis added).

Sterling's third criterion is a broadened statement of the test first enunciated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Such a test recognizes that not everything purporting to be scientific, technical or otherwise the subject of specialized knowledge is sufficiently valid to achieve threshold admissibility as evidence. See also *Mercado v. Ahmed*, 756 F.Supp. 1097 (N.D. Ill. 1991). The lower courts have been confronted with a wide array of subjects which one or another party in litigation has sought to present through the medium of an "expert witness"; in some instances, the proffering party has established the acceptability of the subject within the relevant technical or scientific community; in others, valid analogy between the proffered subject and another accepted subject has been found sufficient; in other instances, the subject has been rejected as not a proper one for expert opinion evidence. See cases collected in M. Graham, *Federal Practice and Procedure*, § 6644 (Interim Edition), ftn. 6-8. This Court has previously noted that District Courts have wide discretion in admitting and excluding expert testimony. *Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974). Considering the wide range of issues and considerations involved and the virtually limitless scope of matters which might be a candidate for recognition as subjects of expert testimony, it is clear that the subject is wisely left to the discretion of

the District Judges to be worked out on a case-by-case basis with appropriate review in the Courts of Appeal.

In the present action, the District Judge properly exercised his discretion in rejecting the proffered evidence since the Plaintiffs laid no predicate to establish that Mr. Devine's anecdotal reflections and musings were in conformity to a generally accepted explanatory theory. The Petitioners have suggested that these opinions were simply another form of *modus operandi* evidence. Such evidence is traditionally admitted where the actions in question are related to observed patterns of conduct of the same actor or to patterns of conduct associated with those who, it has been established with sufficient reliability, share such conduct. Thus, where patterns of conduct have been reliably observed and associated with particular criminal endeavors or with members of a criminal subculture who share certain behavioral patterns [*United States v. Resto*, 824 F.2d 210 (2d Cir. 1987) – role of a steerer in street drug operations; *United States v. Solis*, 923 F.2d 548 (7th Cir. 1991) – use of beepers by drug traffickers; *United States v. Anderson*, 851 F.2d 384 (D.C. Cir. 1988) – role of pimps handling prostitutes; *United States v. Jackson*, 425 F.2d 574 (1970) – tactics of pickpockets], the Courts have generally allowed *modus operandi* testimony for it is then reasonable to associate the conduct or actions of the one who is the subject of such testimony with those of the studied group and to explain and provide meaning to the former's conduct and actions in light of what has become known and established about conduct and actions of the latter. In the present case, the Plaintiffs simply failed to establish that institutional

administrators are recognized to constitute a social subgroup whose shared conduct, actions and tactics recur with sufficient reliability and predictability to warrant the admission of opinion testimony on the subject to be used as a paradigm to provide explanation and meaning to the conduct of the Defendants. The burden of establishing the underlying scientific or technical basis of expert evidence is on the proponent of such evidence. *United States v. Gwaltney,* 790 F.2d 1378, 1382 (9th Cir. 1986). The Plaintiffs' efforts to portray a constitutional dimension to the District Judge's ruling are unavailing. The true issue is simply whether the Plaintiffs, who had the burden of establishing the proper basis for use of expert evidence, met that burden. The answer is equally simple: they did not.

As with the first issue raised by the Petitioners, this second issue fails to present grounds upon which certiorari should be granted.

III. CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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EXCERPTS FROM THE D.C. TRIAL TRANSCRIPT

* * *

[p. 3138] In this case plaintiffs Taylor and Cotton each claim that defendants Gardner and Popovich, while acting under color of state law, intentionally deprived him of his constitutional rights under the Constitution of United States. Specifically, each plaintiff claims that while defendants Gardner and Popovich were acting under color of authority of the State of Florida as representatives of Florida Atlantic University they intentionally violated the plaintiffs' constitutional rights; namely, that they were deprived of their rights under the First and Fourteenth Amendments of the Constitution when Gardner recommended and Popovich approved that Cotton and Taylor be issued nonrenewal or terminal contracts because of these plaintiffs' exercise of their rights of free speech.

Under the First and Fourteenth Amendments of the Constitution of the United States, every citizen has the right to freedom of speech, which includes the right to [p. 3139] speak about matters of public concern. No public employer may terminate an employee for exercising this right.

For purposes of this case, you are instructed that the following acts of speech, and no others, are constitutionally protected: First, plaintiff Taylor's comments to newspapers, the State Attorney's Office and Mr. Sweeney; second, plaintiff Cotton's comments to newspapers; and third, Cotton's nomination and public support of Taylor.

The law provides that a person may sue in this Court for an award of money damages against anyone who,

under color of any state law or custom, intentionally violates the plaintiff's rights under the Constitution of the United States.

In order to prove their claims against an individual defendant, therefore, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that the acts of the defendant were under color of authority of the State of Florida; second, that the plaintiff's exercise of his protected First Amendment rights was a substantial or motivating factor in the defendant's participation in a decision to issue nonrenewal contracts to the plaintiff; and third, that the defendant's acts were the proximate or legal cause of damages sustained by the plaintiffs.

In this case the parties have stipulated or agreed [p. 3140] that the defendants Gardner and Popovich acted under color of state law and you should, therefore, accept that fact as proven.

In order to prove that his speech activities were a substantial or motivating factor in defendant Gardner's decision to recommend or defendant Popovich's decision to approve that a nonrenewal contract be issued, a plaintiff does not have to prove that the protected speech activities were the only reason the defendants acted against him. It is sufficient if the plaintiff proves that his protected speech activities were a substantial consideration that made a difference in the defendant's decision.

Finally, for a defendant's acts to be the proximate or legal cause of damages it must be shown that, except for such conduct, the damages would not have occurred

Causation can be established by direct personal participation or by participation in setting in motion a series of acts by others which the actor knew or reasonably should have known would cause others to inflict constitutional injuries to third parties.

If you find in either plaintiff's favor with respect to each of the things he must prove you must then decide whether the defendants have shown by a preponderance of the evidence that the plaintiff would have been issued a nonrenewal contract for other reasons, even in the absence [p. 3141] of the protected speech activity. If you find that the plaintiff would have been issued a nonrenewal contract for reasons apart from the speech activity then your verdict should be for the defendants.

If you find in either plaintiff's favor with respect to each of the things he must prove as to either defendant and further find that a defendant has not proven that the plaintiff would have issued a nonrenewal contract for other reasons than the defendant has deprived the plaintiff of his constitutional rights and you must next consider the claim of conspiracy. Otherwise, the plaintiff has not deprived, has not been deprived of his constitutional rights, and you need not consider the claim of conspiracy, because where there has been no deprivation of constitutional rights there can no liability for conspiracy.

Each plaintiff has claimed that defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry participated in a conspiracy to deprive his right to free speech. In order to prove this claim, each plaintiff must prove by a preponderance of the evidence each of the following facts: First, that there existed a conspiracy;

second, that the purpose of the conspiracy was to deprive the plaintiff of his constitutional right to free speech by issuing him a nonrenewal contract.

[p. 3142] A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose or to accomplish some lawful purpose by unlawful means. So a conspiracy is a kind of partnership in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or disregard the law.

Mere similarity of conduct among various persons and the fact that they may have associated with each other and may have assembled together and may have discussed some common aims and interests is not necessarily proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be or the details thereof or the means by which the object or purposes were to be accomplished. In order to establish that a conspiracy existed, the plaintiff must show that members of the conspiracy in some way or manner or through some contrivance, positively or tacitly, came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods employed to carry out the alleged [p. 3143] conspiracy were agreed upon, nor that all means or methods which were agreed upon were actually used or put into operation, nor that all persons alleged to have

been members of the claimed conspiracy were members of such conspiracy.

In this suit each plaintiff alleges that the defendants Gardner, Popovich, Michels, Nicewander, Federico and Berry are co-conspirators. There can be no conspiracy unless one, unless more than one person is involved, but it may be that not all the persons charged with being conspirators are, in fact, conspirators. In order to succeed a plaintiff does not have to show you that every one of the named defendants joined in the conspiracy, but he does have to show that at least one of those named defendants conspired with at least one other named defendant.

One may become a member of a conspiracy without full knowledge of all of the details of the conspiracy. On the other had, a person who has no knowledge of a conspiracy but who happens to act in a way which furthers some object or purpose of the conspiracy does not thereby become a conspirator.

Before you may find that a defendant has become a member of a conspiracy it must be shown by a preponderance of the evidence that the conspiracy was knowingly formed and that the defendant who is claimed to have been a member [p. 3144] knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate knowingly means to act or participate voluntarily and intentionally and not because of mistake, accident or other innocent reason. A defendant may be found liable as a conspirator even though he or she may have played only a minor part in the conspiracy.

If you find that either plaintiff has proven all of the elements of a conspiracy then you must find all those defendants who were members of the conspiracy to be liable for damages done to the plaintiff in issuing him a nonrenewal contract, even if one or more of the defendant conspirators did not himself take the action to issue the plaintiff a nonrenewal contract.

If you find that either plaintiff has failed to prove any of the elements of a conspiracy then you must find in favor of the defendants on this claim.

If you find for either plaintiff and against any defendant as to a deprivation of or a conspiracy to deprive free speech rights then you must decide the issue of that plaintiff's damages.

* * *

SECOND AMENDED COMPLAINT

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

CASE NO.: 89-8046-CIV-PAINE

ROBERT TAYLOR and TIMOTHY
COTTON,
Plaintiffs,

vs.

FLORIDA ATLANTIC UNIVERSITY,
HELEN POPOVICH, KENNETH
MICHELS, DENNIS NICEWANDER,
DON GARDNER MARILYN FLOYD
and LEONARD BERRY,
Defendants.

_____/

SECOND AMENDED COMPLAINT

Introduction

1. This action challenges the constitutionality of Defendants' actions in harassing and retaliating against the Plaintiff Robert Taylor for his whistleblowing concerning improprieties and illegalities by Florida Atlantic University (FAU) staff and administration. In addition, this action challenges the constitutionality of Defendant's actions in harassing and retaliating against Timothy Cotton for his support and association with Robert Taylor. This action also challenges the constitutionality of the Defendants' actions in terminating both of the Plaintiffs for exercising their First Amendment rights of free speech by criticizing the University administration. Plaintiffs

seek injunctive and declaratory relief, compensatory and punitive damages from the Defendants.

Jurisdiction

2. Jurisdiction of this Court is invoked pursuant to 28 USC Section 1343, providing for jurisdiction without regard to the amount in controversy in cases seeking redress from alleged infringement of civil rights; pursuant to 28 USC Section 1331, providing for jurisdiction in cases arising under the Constitution and laws of the United States; and pursuant to 28 USC Sections 2201 and 2202, providing for declaratory and injunctive relief. This case arises under the First, Fifth and Fourteenth Amendments to the United States Constitution and 42 USC Section 1983, which creates a federal cause of action for violations of these constitutional rights. The court also has jurisdiction over the other claims pursuant to the doctrine of pendent jurisdiction.

Parties

3. FAU is a state university and is part of the state university system located in Boca Raton, Florida, created by the Florida Board of Regents. FAU is a defendant in this lawsuit only to the extent that injunctive and declaratory relief is sought as to the federal claims and for all purposes as to the state Whistleblower claim.

4. Plaintiff Robert Taylor is a resident of Palm Beach County, Florida. At all times material to this action Robert

Taylor was the Associate Director of Academic Computing for Florida Atlantic University (FAU). Taylor has been employed with the University for more than fifteen years.

5. Plaintiff Timothy Cotton is a resident of Broward County, Florida. At all times material to this action, Timothy Cotton was the Assistant Director of Academic Computing for FAU "Tower" in Broward County. Cotton has also been employed with the University for more than fifteen years.

6. The individual defendants described in paragraphs 7 through 11 are sued in their individual as to Counts I and II and in both their individual and official capacities as to Count III.

7. At all times material hereto, defendant Helen Popovich was the President of FAU and responsible for operation and administration of the University.

8. Defendant Ken Michels was the University Provost and was responsible to the President for administration of academic affairs and any other duties designated by the President at all times material hereto. Defendant Michels was replaced by Defendant Leonard Berry.

9. Defendant Dennis Nicewander was the Vice President for Administrative Affairs, who was responsible to the President for business affairs and any other duties designated by the President at all times material hereto. Defendant Nicewander was replaced by George Perkins.

10. Defendant Don Gardner is the Vice President for Information Resource Management who was responsible for issuing the termination contracts to the Plaintiffs Robert Taylor and Timothy Cotton.

11. Defendant Marilyn Floyd is the Assistant Vice President.

12. At all time material hereto, defendants were acting under color of state law and caused the constitutional and statutory deprivation complained of herein.

FACTS

13. In November of 1985, the Dean of the College of Business, Gary Luing ordered computer equipment initially approved by Defendant Nicewander, Administrative Vice President. Plaintiff Taylor who was responsible for approving any computer purchases, questioned the order because the order was never competitively bid and was to be purchased from a company that apparently employed faculty members of the College of Business.

14. Upon further investigation through 1986, Plaintiff Taylor and others discovered other improprieties and apparent illegalities in the method used by certain staff and administrative personnel involving: 1) the purchase of nine personal computers; 2) the acquisition of mobile homes; 3) travel agent acquisitions, and 4) physical property controls.

15. In August of 1986, Plaintiff Taylor received the largest raise in his department for his outstanding work and contributions to the Academic Computing Department. Taylor had been with the University almost fifteen years.

16. In September of 1986, John Munson, Chairman of the Computer and Information Resources Department, went to the Palm Beach County State Attorney's Office

with the information uncovered by Plaintiff Taylor. Munson had earlier attempted to bring the information to University Administration's attention but was thwarted in those attempts.

17. On September 22, 1986, Plaintiff Taylor was asked by the State Attorney's Office to participate in its investigation. Taylor agreed and supplied them with information he had obtained.

18. In October of 1986, the Internal Auditor Director of the State of Florida's Board of Regents also requested Taylor's participation in an investigation into the improprieties and illegalities mentioned above.

19. On October 9, 1986, Plaintiff Taylor was accosted by Defendant Provost Michaels and was told the University was now aware of Taylor's participation in the State Attorney's Office investigation that Taylor could be fired for giving out information about the University and that he had made a "big mistake" talking to the State Attorney's Office.

20. In late October 1986 the Internal Auditor Director in conjunction with the State Attorney issued his report concerning the above described improprieties and concluded that leadership had not been provided by administration; that there had been improper allocation of resources; poor management; inadequate supervision; and circumvention of normal procedures by academic personnel to acquire and receive goods.

21. In November of 1986 Plaintiff Taylor spoke privately to Defendant President Popovich and then to the

press when Popovich failed to act regarding his continued concern over improper actions by some members of the administration, and in particular Defendant Vice-President Nicewander.

22. The issue of the misappropriation of funds and Defendant Popovich's response to it was the subject of considerable discussion by the public and in the news media.

23. Shortly thereafter, Defendants Nicewander and Popovich then issued a memo to Taylor and others effectively prohibiting them from speaking to the press or otherwise exercising their First Amendment rights in an attempt to deter Taylor from publishing future statements about the University.

24. In 1987, Taylor received the lowest raise in his department and Assistant Vice President Floyd advised that "Taylor is going to be fired. We would have done it sooner but it was too close to his whistleblowing."

25. In March of 1987, Plaintiff Timothy Cotton sent a memo to Acting Academic Vice-President nominating plaintiff Taylor and others to receive the University's Distinguished Service Award for Taylor's roles in exposing corruption in the University. Throughout the remainder of his employment with the University, Plaintiff Cotton was a vocal supporter of Plaintiff Taylor's activities.

26. Furthermore, Plaintiff Cotton was quoted in several newspaper articles criticizing the administration's lack of interest in FAU's Broward Tower facility. In particular, Cotton accused the administration of being afraid to

take any action regarding the Tower because of the shake-up in administration precipitated by Taylor's whistleblowing. Cotton was asked to chair an ad hoc committee on computing at the Tower that suggested in a report that the administration was the cause for problems at the Tower.

27. Despite the fact that Plaintiff Cotton was repeatedly recommended for promotions and pay raises, in 1987, his supervisor told him that he was unable to secure raises for subordinates who "spout off".

28. In February of 1988, Plaintiff Taylor, without warning or explanation, was reassigned to the Broward County branch of FAU. Plaintiff Cotton tried to intercede on Taylor's behalf to prevent the transfer.

29. In February of 1988, Cotton received a phone call from his supervisor that made Cotton suspect that his job was in jeopardy unless he stayed out of the picture on Taylor's job transfer.

30. Cotton called Defendant Berry to complain about his supervisor's statements on February 26, 1988 and was told "It certainly sounds to me like they are trying to shut you up."

31. In July of 1988, FAU hired Defendant Don Gardner as Vice President for Information Resource Management, a newly created position.

32. After a thirty minute meeting with Taylor in July of 1988, Defendant Gardner advised Taylor that he would not be reappointed in August of 1989 when his contract expired.

33. After a thirty minute meeting with Cotton in August of 1988, Defendant Gardner advised Cotton that he would not be re-appointed in August of 1989 when his contract expired. No explanation for the decision to terminate Taylor and Cotton has ever been given by the University, except that Taylor and Cotton no longer "fit into the plan" at FAU after over thirty years of combined service to the University in Academic Computing. Furthermore, both were repeatedly assured that their "performance was not to blame."

34. The Defendants, through their past and present harassment, their discriminatory and retaliatory attempts to transfer and then terminate; and their general terms and conditions of employment, have engaged in a continuing pattern or practice of discrimination and retaliation which has taken place in the past and will continue until their contracts expire in August of 1989.

35. The Defendants, Popovich, Michels, Nicewander, Floyd and Berry unlawfully agreed and conspired under color of state law to intentionally hinder, obstruct and injure the Plaintiffs' career advancement within FAU to wit:

a. Defendant Nicewander, when he discovered that Taylor was questioning his approval of purchase orders, began to create a scenario whereby Taylor appeared to be a "troublemaker" and "malcontent" within the University.

b. During the following months, Nicewander initially enlisted the assistance of Popovich, Michels and Floyd to help in denying Plaintiffs Taylor and Cotton

work opportunities and harass Plaintiffs in the workplace in furtherance of the conspiracy.

c. Thereafter, with the full knowledge and/or approval of Defendants Popovich, Michels and Nicewander enlisted the aid of others within the administration including Defendant Berry to portray Taylor and Cotton in an unfavorable light.

d. When Defendant Gardner was being hired, Plaintiffs believe and therefore aver that he was directly or indirectly told by the Defendants above to fire Taylor and Cotton.

36. Taylor and Cotton have complied with all conditions precedent prior to filing this action as required by Fla. Admin. Code Sec. 6C5-5.010.

Count I

(Deprivation of First Amendment Rights)

37. Plaintiffs reallege every allegation contained in paragraphs 1 through 36 above as though fully set forth herein.

38. By means of such actions outlined above, all the defendants listed above, acting alone and in concert unlawfully did punish Plaintiffs' lawful exercise of their rights to free association, speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

39. Defendants' unlawful actions have interfered with Plaintiff's ability to exercise their rights as citizens

and concerned members of a University in dire need of strong and capable leadership.

40. Defendants' unlawful actions were designed to humiliate and embarrass Plaintiffs and to cause others in the academic community to shun them, and to cause Taylor and Cotton anxiety, distress and hardship.

41. The action of Defendant Popovich, through the other Defendants, in issuing Taylor and Cotton terminal contracts was specifically designed and calculated to teach Taylor, Cotton and other "whistleblowers" in the University system a lesson about the consequences of speaking out about the disgraceful lack of management and control as confirmed by several separate and independent studies of FAU.

42. Defendants actions were wanton, reckless, willful, malicious and constituted a deliberate abuse of their official powers to violate Plaintiff's First and Fourteenth Amendment rights. Defendants actions are particularly offensive in view of the supposed purpose of a university to encourage the free dissemination and discussion of ideas and methods to improve society.

43. As a direct and proximate result of these actions, Plaintiffs sustained great mental and emotional distress and damage to their ability to earn a living in excess of $10,000.

44. Plaintiffs are further entitled to punitive or exemplary damages in excess of $10,000.

45. Plaintiffs are further entitled to an injunction restraining Defendants' from in any manner terminating Plaintiffs from their position with FAU or otherwise

impairing their ability to work. Plaintiffs have no adequate remedy at law and an injunction is their only means of securing complete relief. Plaintiffs are suffering and will continue to suffer irreparable injury from Defendants' actions alleged above, unless such actions are enjoined by this court.

Wherefore, the Plaintiffs request this court to provide Plaintiffs with all the relief permitted by Federal law including, but not limited, to:

a) Reinstatement of Taylor and Cotton to the same positions held before the adverse action was commenced or to equivalent positions;

b) Reinstatement of Taylor and Cotton's full fringe benefits and seniority rights;

c) Compensation for lost wages, benefits and other seniority rights;

d) Payment of reasonable costs, including attorney's fees;

e) Issuance of an injunction by this court prohibiting the Defendants from their present and anticipated future retaliatory conduct;

f) Compensatory damages for the mental and emotional distress caused Robert Taylor and Timothy Cotton and for their inability to earn a living in excess of $10,000.

g) Punitive damages in excess of $10,000.

h) Any other relief the court deems appropriate.

Count II

(Violation of Fourteenth Amendment to Due Process)

46. Plaintiffs reallege every allegation contained in paragraphs 1 through 36 above as though fully set forth herein.

47. Rule 6c5-5.010 (3)b, Fla. Admin. Code provides that: " The decision not to offer further appointment to an employee shall not be based on constitutionally impermissible grounds."

48. Rule 6c5-5.010 (3) b, Fla. Admin. Code creates a liberty or property interest in not being refused reappointment based on constitutionally impermissible grounds.

49. The refusal to reappoint Robert Taylor and Timothy Cotton was substantially based on Robert Taylor and Timothy Cotton's exercise of their First and Fourteenth Amendment Rights.

Wherefore, the Plaintiffs request this court to provide them with all the relief permitted by the Whistleblowers Act of 1986 (Fla. Stat. Sec. 112.3187) and Federal law including, but not limited to:

a. Reinstatement of Taylor and Cotton to the same positions held before the adverse action was commenced or to equivalent positions;

b. Reinstatement of Taylor and Cotton's full fringe benefits and seniority rights;

c. Compensation for lost wages, benefits and other seniority rights;

d. Payment of reasonable costs, including attorney's fees;

e. Issuance of an injunction by this court prohibiting the Defendants from their present and anticipated future retaliatory conduct;

f. Any other relief the court deems appropriate.

Count III

Sec. 112.3187 (Fla. Stat. 1986)
(Whistleblower Act of 1986)

50. Plaintiffs reallege every allegation contained in paragraphs 1 through 36 above as though fully set forth herein against defendant FAU.

51. As set forth in "Statement of Facts" above, Taylor was and is an employee of the state university system who has in the past and at present been the victim of adverse personnel action by the administration at FAU for his disclosure of information to the State Board of Regents' Auditor and to the State Attorney's Office.

52. The information requested by and disclosed to the Auditor and State Attorney's office by Taylor was true and concerned suspected acts of malfeasance and misfeasance and neglect of duty by FAU's administration and staff as outlined in the Statement of Facts.

53. All prerequisites for filing this claim under Fla. Stat. Sec. 112.3187 have been complied with and Plaintiff, Robert Taylor has exhausted all administrative remedies prior to bringing this action.

Wherefore, the Plaintiffs request this court to provide them with all the relief permitted by the Whistleblowers Act of 1986 Sec. 112.3187 (Fla.Stat. 1986) and federal law including, but not limited, to:

a) Reinstatement of Taylor and Cotton to the same positions held before the adverse action was commenced or to equivalent positions;

b) Reinstatement of Taylor and Cotton's full fringe benefits and seniority rights;

c) Compensation for lost wages, benefits and other seniority rights;

d) Payment of reasonable costs, including attorney's fees;

e) Issuance of an injunction by this court prohibiting the Defendants from their present and anticipated future retaliatory conduct;

f) Any other relief the court deems appropriate.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Clark W. Smith, Barristers Building, Suite 500, 1615 Forum Place, West Palm Beach, FL, 33401 this 16th day of August, 1989.

/s/ W. Trent Steele
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